Supreme Court, U.S.
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No. 99-1364

In the

Supreme Court of the United States

IN RE MILK PRODUCTS ANTITRUST LITIGATION

RAINY LAKE ONE STOP, INC.; HOFFMAN CORNER OIL CO.; THOMAS DECAIGNY, d/b/a DeCaigny Grocery; and STAN DENNE, d/b/a Denne's Market & Roseville Superette,

Petitioners,

v.

MARIGOLD FOODS, INC.
LAND O'LAKES, INC.
BOLSWESSANEN U.S.A. INC.
MEYER BROS. DAIRY, INC.
OAK GROVE DAIRY, INC.
K&P COMPANY, INC.
MARIGOLD VENTURE, INC.
COUNTRY LAKE FOODS, INC.
BOLSWESSANEN HOLDING, INC.
GEO. BENZ & SONS INC.
SCHROEDER BROTHERS, INC.
JOHN DOE, RICHARD DOE & XYZ CORPORATION

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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11pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT 1

1. The Antitrust Fraudulent Concealment Jurisprudence Tacitly Accepted by the Eighth Circuit Now Stands in Conflict with a Recent Factually and Legally Analogous Case from the Eleventh Circuit. 1

CONCLUSION 6

TABLE OF AUTHORITIES

Page

CASES

Great Rivers Coop. v. Farmland Indus., Inc., 120 F.3d 893 (8th Cir. 1997) 3

In re Beef Indus. Antitrust Litig., 600 F.2d 1148 (5th Cir. 1979) 4

In re Milk Products Antitrust Litig., 195 F.3d 430 (8th Cir. 1999) 1, 2, 3, 5, 6

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) 4

Morton's Market, Inc. v. Gustafson's Dairy, Inc., 198 F.3d 823 (11th Cir. 1999) 1 3, 4, 5, 6

Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445 (6th Cir. 1988) 2

Renfroe v. Eli Lilly & Co., 686 F.2d 642 (8th Cir. 1982) 3

Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119 (4th Cir. 1995) 2

Texas v. Allan Constr. Co., 851 F.2d 1526 (5th Cir. 1988) 2

STATUTES AND RULES

Fed. R. Civ. P. 9 and 12(b)(6) 3

Sherman Act, 15 U.S.C. § 1 4

Supreme Court Rule 15.8 ..... 1, 2

INTRODUCTION

Pursuant to Supreme Court Rule 15.8, Petitioners Rainy Lake One Stop, Inc.; Hoffman Corner Oil Co.; Thomas DeCaigny, d/b/a DeCaigny Grocery; and Stan Denne, d/b/a Denne's Market & Roseville Superette, respectfully submit this Supplemental Brief in support of their Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit. This decision, which impliedly affirmed the dismissal of fraudulent concealment allegations on the pleadings of this antitrust class action, now stands in direct conflict with recently decided precedent from the United States Court of Appeals for the Eleventh Circuit.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

1. The Antitrust Fraudulent Concealment Jurisprudence Tacitly Accepted by the Eighth Circuit Now Stands in Conflict with a Recent Factually and Legally Analogous Case from the Eleventh Circuit.

By failing to review the district court's dismissal of Petitioner's fraudulent concealment allegations (App.-62), the Eighth Circuit has left intact a decision that required an extreme and unwarranted level of specificity for pleading fraudulent concealment in an antitrust case. In re Milk Products Antitrust Litig., 195 F.3d 430, 434-35 (8th Cir. 1999), petition for cert. filed (U.S. Feb. 15, 2000) (App.-15-21). The Eighth Circuit's refusal to reverse the district court's decision, therefore, has endorsed precedent that stands in direct conflict with jurisprudence from the Fourth, Sixth and Fifth Circuits, and now most recently, the Eleventh Circuit. See Morton's Market, Inc. v. Gustafson's Dairy, Inc.,

198 F.3d 823 (11th Cir. 1999);[1] Supermarket of Marlinton, Inc. v. Meadow Gold Dairies, Inc., 71 F.3d 119, 124 (4th Cir. 1995); Pinney Dock & Transp. Co. v. Penn Cent. Corp., 838 F.2d 1445, 1472-74 (6th Cir.), cert. denied, 488 U.S. 880 (1988); Texas v. Allan Constr. Co., 851 F.2d 1526, 1532 (5th Cir. 1988).

In In re Milk Products Antitrust Litigation, the district court held that Petitioners failed to plead with sufficient particularity that Respondents concealed Petitioners' antitrust cause of action, that Petitioners failed to discover the existence of the antitrust claim, and that Petitioners failed to exercise due diligence to discover their claim. (App.-17-19.) Petitioners' complaint, filed in May 1996, specifically alleged that they did not know of their antitrust claims until John Doyle, the former Marigold employee cloaked with antitrust immunity, went public earlier in 1996 with the details of Respondents' decade-long practice of fixing prices and how Respondents concealed their illegal activities. (A-48-49.) Respondents, for example, concealed the price-fixing conspiracy by falsely attributing price increases to market conditions, paying "hush money" to keep an executive silent, participating in secret meetings where no records of price-fixing activities were kept, and acquiescing to all actions undertaken by the conspirators. (App.-19-20.)

The district court determined that these allegations were insufficient to meet its own heightened pleadings standard for alleging fraudulent concealment. As to due diligence, the district court rejected Petitioners' allegation that they did not become aware of the price-fixing conspiracy until Doyle went public in 1996, shortly before Petitioners filed their lawsuit, because the Justice Department ten months earlier had announced investigation into Respondents' unlawful rigging

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[1] Although decided on December 20, 1999, the Eleventh Circuit has not yet issued its mandate. This Supplemental Brief calls the Court's attention to this new precedent. See Supreme Court Rule 15.8.

of school milk bids. (App.-21.) This, the district court determined, should have excited attention and have placed Petitioners on inquiry notice of a price-fixing claim. In the end, the district court concluded Petitioners failed to plead fraudulent concealment with particularity and dismissed with prejudice this claim under Federal Rules of Civil Procedure 9 and 12(b)(6).[2] (Id.)

The precedent established in In re Milk Products Antitrust Litigation conflicts directly with Morton's Market, decided by the Eleventh Circuit on December 20, 1999. With similar fraudulent concealment allegations, which were *dismissed on the pleadings* as insufficient in Milk Products, Morton's Market reversed *summary judgment* dismissing an antitrust plaintiffs' fraudulent concealment claims. The plaintiffs in Morton's Market were retailers that directly purchased milk from dairies engaged in the production and sale of milk in Florida. Beginning in the early 1970s, the dairies conspired to rig their bids to Florida public school districts. In 1987, the United States and Florida began investigating the dairies' competitive practices. Florida commenced suit against the dairies in 1988 and the suit was reported in major newspapers. The president of Morton's Market read some of the articles, but he took no action to investigate whether the dairies also conspired to fix the price of milk to retailers. The United States in 1987 and 1988 also brought criminal charges against the dairies. By 1992, all the dairies had pleaded guilty to federal antitrust violations. Id. at 826. In 1993, the plaintiffs commenced lawsuits against the

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[2] This holding clearly ignored prior Eighth Circuit cases unequivocally holding that the issue of when a plaintiff has "notice" of the claim is a question of fact for the jury. See Renfroe v. Eli Lilly & Co., 686 F.2d 642 (8th Cir. 1982); see also Great Rivers Coop. v. Farmland Indus., Inc., 120 F.3d 893, 896 (8th Cir. 1997) ("inquiry notice exists when the victim is aware of facts that would lead a reasonable person to investigate and consequently acquire actual knowledge of the defendant's misrepresentations").

dairies for violations of the Sherman Act, 15 U.S.C. § 1. Id. at 827.

The district court in Morton's Market granted the dairies' motion for summary judgment of dismissal based on the four-year statute of limitations, thereby rejecting the plaintiffs' argument that the doctrine of fraudulent concealment tolled the statute of limitations. The Eleventh Circuit reversed. First, the court determined that the district court improperly applied federal accrual law as to continuing antitrust violations. The court of appeals held that "when sellers conspire to fix the price of a product, each time a customer purchases that product at the artificially inflated price, an antitrust violation occurs and a cause of action accrues. Id. at 828 (citing Klehr v. A.O. Smith Corp., 521 U.S. 179, 189 (1997)). Because the question of the commencement is a question of fact, it cannot be determined on summary judgment if a material fact dispute exists, as was the case in Morton's Market. Id.

Second, the Eleventh Circuit reversed on the basis of fraudulent concealment. Under this doctrine, the plaintiffs had to show that the dairies "concealed the conduct complained of, and that [plaintiffs] failed, despite the exercise of due diligence on [their] part, to discover the facts that form the basis of [their] claim." Id. at 832 (citing In re Beef Indus. Antitrust Litig., 600 F.2d 1148, 1169 (5th Cir. 1979)). Like the question of accrual of an antitrust cause of action, the issue of when a plaintiff has "notice" of an antitrust claim is a question of fact for the jury. Id. The Eleventh Circuit observed:

> It is not enough for summary judgment to point to facts which *might* have caused a plaintiff to inquire, or *could* have led to evidence supporting his claim. A defendant who does this has succeeded in demonstrating only that there is a jury question

> regarding the tolling of the statute of limitations by fraudulent concealment.

Id. at 832-33 (emphasis in original). The court of appeals rejected the district court conclusion that the newspaper articles regarding bid-rigging in 1988 put plaintiffs on notice of their antitrust claim. It held "we know of no case, however, in which information regarding one sort of antitrust violation by a defendant has been held, as a matter of law, to constitute notice of all other possible violations." Id. at 833. Whether the notice of school milk bid rigging should have excited the plaintiffs to inquire is a question for the jury. Id. at 834. The Eleventh Circuit observed that the diaries

> point to no evidence in this record suggesting that the bid-rigging investigations verified or even publicized any information regarding commercial price fixing prior to [the last dairy's] guilty plea in 1992. Neither do they point to evidence that plaintiffs had independent access before that time to any information, beyond the newspaper articles, that would have tended to verify their suspicions had they had any.

Id. After concluding that factual questions existed about fraudulent concealment and due diligence, the Eleventh Circuit reversed the district court's grant of summary judgment. Id. at 837 ("Of course, the jury will ultimately determine what these plaintiffs should have know and when they should have known it").

Morton's Market and In re Milk Products Antitrust Litigation stand in direct conflict. Here, Petitioners met many of the same arguments the dairies in Morton's Market advanced. Respondents had been subject to antitrust investigation for school milk bid-rigging in the mid-1990s. Newspaper reports publicized these events. However, despite

Petitioners' fraudulent concealment allegations, the court in In re Milk Products Antitrust Litigation held the allegations *failed as a matter of law at the pleadings stage*. (App.-15-21.) This conclusion conflicts with Morton's Market, which held that similar fraudulent concealment allegations created a material issue of fact *precluding summary judgment*.

These cases cannot be reconciled and a circuit split now exists regarding the standards by which fraudulent concealment allegations in an antitrust matter must be viewed. The Eleventh Circuit has properly recognized that the questions present factual determinations for a jury; the Eighth Circuit has improperly endorsed a standard that, *inter alia*, allows a district court, based solely on the pleadings, to decide whether a reasonably diligent plaintiff would have discovered the antitrust price-fixing scheme and the fraudulent concealment thereof. This Court's review is necessary to resolve the scope of fact-finding authority vested in the federal court when considering the dismissal of fraudulent concealment allegations in an antitrust case at the pleadings stage.

CONCLUSION

For these reasons and the reasons stated in the Petition for Writ of Certiorari, Petitioners respectfully request that the United States Supreme Court issue the Writ to review the decision of the Eighth Circuit that conflicts with precedent from other circuits.

Respectfully submitted,

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